

BOARD OF ZONING APPEALS
Minutes
October 22, 2002

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas, was held at 1:30 p.m., on October 22, 2002, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance:

JAMES RUANE, JAMES SKELTON, JOHN ROGERS

RANDY PHILLIPS, BICKLEY FOSTER, and ERMA MARKHAM in at 1:47 p.m.

SHARON DICKGRAFE – Assistant City Attorney present

J. R. Cox -- Office of Central Inspection present.

The following Planning Department staff members were present:

DALE MILLER Secretary,

SCOTT KNEBEL Assistant Secretary,

ROSE SIMMERING, Recording Secretary.

JAMES RUANE, BZA Board Chair: Brings BZA meeting to order at 1:30 p.m. We are here to determine only one issue today, which I assume must be of great importance to all of you or you wouldn't be here. We have some procedural and other housekeeping items that we will go through first, but this is an unusually large crowd for us. I really want you all just to remember to be respectful of others, and not to interrupt, not to try to speak over them. We need to take a very precise record of these proceedings, and that will be impossible if more than one person is speaking at a time.

ROSE SIMMERING: Calls role. There is a quorum.

RUANE: First Item on our Agenda is approval of minutes from our meeting of September 24, 2002, any discussion or modification to those minutes as submitted? If not let's have a quick motion and move on.

ROGERS moves SKELTON seconds to approve BZA meeting minutes of September 24, 2002.

MOTION carries 5-0.

RUANE: Therefore, we now move onto Item 2 on our Agenda. This is BZA Case 2002-00061. It is an Appeal of an administrative interpretation by the Zoning Administrator dated, August 22, 2002 regarding Recreation and Entertainment, Indoor (Dickinson Theatre) for DP-104, that is the Community Unit Plan for Oak Cliff Estates. Scott from city staff will begin this and will outline the protocol as far as the sequence of events.

SCOTT KNEBEL, Planning Staff: The item before you, as you mentioned, is an Appeal of an Administrative Interpretation of DP-104, which is the Oak Cliff Estates Community Unit Plan. This property is zoned "LC" Limited Commercial, and is located at the northwest intersection of Maple and Maize, as shown here. The subject property is outlined in black. It is a portion of Parcels 2 and 3 of this Community Unit Plan. You can see from the aerial that the property is currently vacant. It has commercial uses to the south, commercial and multi-family uses to the east, and then lower density duplex type, and condominium type development immediately to the west, and to the north, and then some single family uses in the area surrounding it that are just barely in the picture here.

This is the plan. You can see the two large parcels are Parcels 2 and 3 on that plan. This is looking at the property. This is the west half of the property. This is looking east across the property towards Maize Road. This is the commercial property that is located on the north side of Maple, just immediately south of the property, and these are the commercial uses on the south side of Maple.

RUANE: Scott, let me interrupt for a moment. Can you all see? Would you dim the lights please? Is that the problem, or is it angle? I would encourage you to get up and move that way so that you can see.

KNEBEL: This is looking down at the properties on the southwest corner, and then these are the residential uses west of the subject project, and then the residential uses to the north.

Let me go through the packet that you have of material. The first item that you have is a memo from the Board of Zoning Appeals Attorney that summarizes the issues, and outlines the Boards options. Essentially, the Board has the options of affirming the interpretation, reversing the interpretation, or modifying the interpretation, to put it simply.

It is a little more complex than it is outlined in the memo there. To that end, there are sample motions both to reverse and to affirm in this. Those motions would need to be based on specific facts that are going to be forthcoming at this hearing that you would need to make as a part of that motion.

After those sample motions is the letter of appeal from the applicant's agent, Austin Miller, and it outlines the basis upon which they are filing this appeal.

Then there are a couple of letters that are the interpretation. There is a letter dated September 13, 2002, which essentially states that the letter dated August 22, 2002, is the interpretation that the Zoning Administrator for the City of Wichita made, and that letter was written in response to a letter dated September 3, 2002, from Austin Miller requesting further clarification of the interpretation that was written on August 22, 2002.

The interpretation letter dated August 22, 2002, outlines in pretty specific detail the reasons behind the interpretation, and essentially at the end of the letter it states that the

C.U.P. DP-104 Oak Cliff Estates does not allow theaters by right on Parcels 2 or 3, and that a C.U.P. Administrative Adjustment or C.U.P. Amendment would be required to allow that use on this property. So that is the issue that is being appealed today.

The next letter in your packet is the original request for the interpretation that outlines, from the Appellant's standpoint, the reasons that they feel like the Zoning Administrator should have interpreted that the theater or indoor recreation uses are permitted uses in the C.U.P. There is a restrictive covenant in the packet that the Appellant has offered, as I guess, I am not really sure what the purpose is there, I guess just to demonstrate that the Appellant is willing to mitigate some of the negative impacts that this theater use might have.

There is a number of materials that the Zoning Administrator used to base his interpretation upon, including the Building Permit application, some typewritten transcript of some notes that the Zoning Administrator took, and then the handwritten version of notes regarding comparable Community Unit Plans that were reviewed. Then there is information from the Traffic Engineer regarding the traffic impact, and then copies of the C.U.P.'s that are referenced in those notes. Then at the end of our packet is the Oak Cliff Estates Community Unit Plan, and it's associated adjustments that have occurred since it was adopted back in 1982.

The appeal process works such that after I introduce the item, which I am about to wrap up here, the Appellant is given 15 minutes to state their case. The way that the appeal process works is that the Zoning Administrator is presumed to be correct in their interpretation, and it is the burden of the Appellant to demonstrate to the Board through this hearing process that the interpretation was not correct.

After the 15 minutes that the Appellant is given to state that case, the Zoning Administrator is then given 15 minutes to respond to the Appellants presentation, and then after that it is open to public comment, and each speaker is given 5 minutes. Then the hearing is closed, and the conversation is among the Board, and then the Board would then make it decision.

I believe this is correct, right Sharon, the Board has up to 40 days to render a decision. It is not a requirement that a decision be made today. The Code does provide for a time period of 40 days to render a decision?

SHARON DICKGRAFE, Assistant City Attorney, BZA Attorney: That is correct.

KNEBEL: You do have a request from the Appellant that he be afforded 5 minutes of rebuttal time at the conclusion of the Zoning Administrators presentation, and then 5 minutes of rebuttal at the close of the public comment section. That is not provided for in the Board's Bylaws and would require that the Board make and pass a motion to set aside their rules of procedure to add this, if that is the will of the Board. With that I will close my comments and take questions if you have them.

RUANE: Any questions from the Board for Scott? Thank you Scott. We need to make a decision with regard to the request for rebuttal time. Question of the applicant, Tim, would you be willing to use any of the 15 minutes allotted under our general rules for that rebuttal?

AUSTIN MILLER, INC., %TIM AUSTIN, 142 N. Emporia, Wichita, KS 67202: I would prefer to have 5 additional minutes because it is a fairly complicated issue and I feel that I will take the full 15 minutes just making my presentation.

RUANE: So, 15 minutes, and plus 5 minutes, and then plus 5 more minutes?

AUSTIN: Yes, the 5 minutes after the neighbors is just kind of iffy. It depends on what Mr. Ferris says, so I have a chance to respond to him. Other than that I am not sure that I will need more time, maybe a couple of minutes.

RUANE: I wanted to understand your request.

AUSTIN: Thank you.

BICKLEY FOSTER: Mr. Chairman, do you need a motion now to decide that?

RUANE: No, I am trying to figure out what the request is. Kurt, on behalf of the City of Wichita would you request or do you need any additional rebuttal time?

KURT SCHROEDER, SUPERINTENDET OF CENTRAL INSPECTION: If he is going to get the rebuttal time. I don't think that I need 5 minutes, but maybe just 2 or 3 minutes possibly if some other question arose that I might want to address.

RUANE: Okay, Thank you very much. Now I will bring the comments up here. Scott has done a very good job of describing what our general rules are. Rose do you have a question?

SIMMERING: It is hard to hear today. I don't know is the volume up? I know Mr. Ruane when you speak the arrow is not going as high as it should.

RUANE: Who runs the soundboard?

MILLER: Maybe if the Board would be sure to speak into the microphones.

RUANE: Is that better?

SIMMERING: Yes, Thank you.

RUANE: For the Board, we need to determine what if any exception to our general rules to make in response to this request. I would first like to hear us discuss before we go right to a motion.

FOSTER: This is an important topic, and it certainly deserves to take the time necessary to do it. This request has been studied by the staff and by the applicant for some time. It seems to me that it is not an unreasonable request. We only have one item on the Agenda here today.

JAMES SKELTON: I believe everything is reasonable as well.

RUANE: Everything including their rebuttal time?

SKELTON: Yes, sir.

JOHN ROGERS: I would like to see the time allowed to both parties be equal.

RUANE: Implied within this is a determination or a question of who will have the last word. Are there any sentiments about that from the Board? Let's make a plan so that we can get started.

FOSTER: Procedure I believe has generally been to allow the applicant to have the last say, and we can always ask questions of the staff as part of our job.

DICKGRAFE: It would be my thought that because this can be reviewed on appeal that the Board would want to give both sides the adequate opportunity to make the record. Since it is the applicant's burden, it would probably be appropriate for him to have last say or the last word to the Board unless there were additional questions.

RUANE: Thank you for that advice. Following up on that it seems a motion would be in order.

ROGERS moves FOSTER seconds, to give both parties an additional 5 minutes at the end for additional comments.

RUANE: Okay, can you expand on that? Each party, appellant and city staff, would each have 15 minutes?

ROGERS: Plus an additional 5 minutes.

RUANE: In what sequence?

ROGERS: 15 minutes first, and 5 at the end.

RUANE: But of the 5 minutes in what sequence would those follow under your motion?

ROGERS: It would be as Sharon stated, from the applicant the last 5 minutes.

RUANE: Okay, does everyone understand the motion? Any further discussion?

ROGERS moves **FOSTER** seconds, to give both parties an additional 5 minutes at the end for additional comments with the applicant going last.

MOTION carries 4-1.

RUANE: So that you understand the procedure, first we will hear from Mr. Austin, for 15 minutes on behalf of the applicant. Then we will hear from Kurt Schroeder on behalf of the Zoning Administrator's office for 15 minutes. Then we will hear from Mr. Ferris representing a group of landowners. Then we will hear from others who have signed in on the sign in sheet. If you have not already done so, I would encourage you to do so now. I remind you at this point that when you address us, you need to come to the podium. You will need to introduce yourself, provide us with your address, etc., for our minutes and for the record keeping that we need to do. I think I have covered it all, and these rebuttals will follow the homeowners or landowners comments and they will go in order of Kurt first and Tim second. It would then appear that we are ready for the statements of the applicant.

Erma Markham in at 1:47 p.m.

TIM AUSTIN: There is one bit of housekeeping that I would like to discuss, Mr. Chairman. It has come to my client's attention that Mr. Randy Phillips may be the architect of record for Warren Theaters. We certainly respect Mr. Phillips' ability in the community. He is very well respected. But my clients are a little uncomfortable that there may be a perception that something would be amiss. We are not sure if Mr. Phillips is comfortable making a decision on our presentation, and we would ask that we discuss that before I begin my presentation. We would like Mr. Phillips to recuse himself.

RUANE: The request for Randy Phillips to recuse himself from the Board today? Procedurally how would that be determined? Is that for the Board to make?

DICKGRAFE: Generally, it is going to be up to Mr. Phillips to make a determination as to whether or not he has a conflict of interest. Generally, an economic interest in another business is not necessarily an absolute factor for him to declare a conflict of interest. The Bylaws provide that the member declaring a conflict of interest ask that they abstain from voting. So it is entirely up to Mr. Phillips as to whether or not that he believes that there is a conflict of interest and any interest that he feels needs to be disclosed to the Board before he votes on this matter should he determine to vote.

RUANE: Thank you for that information. Randy, what say you?

RANDY PHILLIPS: I have looked at this, and I don't feel that there is a conflict of interest. I can appreciate their stance. For the record, we have represented Mr. Warren's interest as far as architects for almost all of his projects. At the same time, we were also involved in the North Rock where we represented Dickinson Theatre at that time. As far as I am concerned, I am not trying to rule on whether it is an appropriate project or

whether it should be there or not. I am here basically to cast a vote either for or against the interpretation as the appeal.

RUANE: Record has been made. Let's start with your 15 minutes of allotted time.

TIM AUSTIN: As part of my initial presentation, one thing that I would like to do is just clarify some things that we believe to be erroneous. I would refer you to our August 12th letter to Mr. Schroeder; the first page, paragraph one. Specifically, the request was "In accordance with Sections V-E.15 and V-H of the Unified Zoning Code for Wichita-Sedgwick County, we request the use of Recreation and Entertainment, Indoor, be permitted by the Zoning Administrator on Parcel 2 and 3 of the community Unit Plan.

I think it is very important that we understand that while Dickinson Theatres is involved and quite likely will build a theatre at that site should we be successful in our appeal, technically the request is for Recreation and Entertainment, Indoor. A theatre is a use that falls under that category, but so do bowling alleys, bingo parlors, video arcades and some other uses.

We feel that point needs to be clarified, and to that extent Mrs. Dickgrafe's memo on the front page the numerated paragraph #1 states, "Failing to conclude that the proposed theater was similar and no more intensive use than those allowed by the language in the CUP" again the request is not about a theatre, it is about Recreation and Entertainment, Indoor.

Under Recreation and Entertainment, Indoor under the Zoning Code, page 26, if you care to follow along, Recreation and Entertainment, Indoor as defined in the Zoning Code means a privately-owned establishment offering recreation, entertainment or games of skill to the general public or members that is wholly enclosed in a building. Typical uses include bowling alleys, indoor theaters, bingo parlors, pool halls, billiard parlors, video game arcades, racquetball and handball courts, and amusement rides. It does not include buildings typically accessory to a subdivision that are for use by the subdivision's residents and their guests.

Again the theatre is just one identified use; however, under those uses that are all lumped in under Recreation and Entertainment, Indoor, those uses are all treated equally. None of the uses anywhere in the Zoning Code are identified separately or treated differently in any fashion. An example of that might be a car wash. If you are familiar with car washes they are allowed by right in "LC" Limited Commercial Zoning except for when a car wash is within 200 feet of residentially zoned property. Then it becomes a Conditional Use subject to conditions and a public hearing.

Again, that is a very important distinction. City staff has, and their position has been, that it is about a theatre, and that is more intensive, and our feeling is that if the theatre was so much more intensive of a use historically when the Zoning Code was developed, that it would have been identified separately as a separate use which under "LC" Limited Commercial zoning. There are 83 uses that are listed. Theatre is not one of those.

We believe that based on language of the C.U.P., where it states that a shopping center is allowed, that Recreation and Entertainment, Indoor is an allowed use under shopping centers. To that extent I have a handout that shows typical uses within a shopping center. One thing that you will note under the Zoning Code that shopping center in and of itself is not defined. Many of the older community unit plans that were established in the late 1970 early 80's and even a little bit into the early 90's included language for shopping centers, but shopping center itself is not defined under the Zoning Code. The handout that I have given you is a document that is from a book called "Shopping Center Development Handbook" that was published in 1977 by the Urban Land Institute, and you can see that on the second page of that handout there are tenant classifications for shopping centers, and I have noted on there that typical uses included in shopping centers do include Recreation and Entertainment, Indoor uses and to the bottom of that page, I have arrowed bowling alley, cinema, service station, ice skating rink, and arcade, amusement center, so we believe that to be important.

The question then becomes are those uses that I have identified, or that are identified by this book, the Urban Land Institute book, consistent with shopping centers and uses that have been developed in the City of Wichita? I have another handout.

RUANE: For the record, all of these handouts, as well as the most recent correspondence that was on top of our booklets as we walked in, will be made a part of the record on this item.

AUSTIN: The handout is a spreadsheet that I have developed in doing some research of some community unit plans. On the far left column you will see that there is CUP # that is identified. There is an approval date in the second column, as to when that community unit plan was adopted, the name of the community unit plan, its general location, the parcel number in question, the second to the last column is just what the uses were from that C.U.P. and the last column is the Recreation and Entertainment, Indoor use that has either existed in that shopping center or is presently in existence today.

Just to read it into the record, the first one was DP10, approved in 1988, and that may be when it was first amended, Wichita Mall Shopping Center, on east Harry, Parcel #1, the uses include Shopping Center including department stores, drug stores, clothing stores, variety stores, jewelry shops, and restaurants. Many of you will remember that there was a theatre located in that building. That C.U.P. was never adjusted nor amended to include that use it was just a function of shopping center.

The second one was DP12, approved in 1987, the Kellogg Mall Commercial, and that is Towne East, the northwest corner of Kellogg and Rock Road, Parcel 11, is the Village Fashion Center, the uses from the Community Unit Plan are Retail sales, offices, restaurants (exclusive of fast food types) and private clubs. Again you can see that the Recreation and Entertainment, Indoor use that was located there for a number of years was the kids Discovery Zone.

The third one was DP16, which was approved in 1984, Seneca Square Shopping Center, northwest corner of 31st & Seneca, Parcel 1 the uses are simply Shopping Center, and related uses. Currently there is a Bingo Parlor that is operating in that shopping center. Again review the records for the city. There was never any administrative adjustments or amendments to allow that use.

The fourth one was DP21, which was approved in 1985, The Westway Shopping Center, southwest corner of Pawnee and Seneca, Parcel 1 the language for that particular Parcel is almost verbatim for the one for ours. It talks about shopping center and you can read it there. Shopping Center and associated tires, batteries, and accessories stores, supermarkets, financial institutions, offices, personal services, and retail sales as permitted by zoning district. Again, there was a theatre in operation in the early 80's in that shopping center.

The fifth one was DP43, approved in 1981, The Kincaid Community Unit Plan, most of us know that as the Pawnee Plaza Shopping Center, at the southeast corner of Pawnee & Broadway, Parcel 2, simply says Shopping Center and the recreation, entertainment use that was allowed there was a 4 screen theatre that was actually operated by Dickinson for many years.

Lastly, was DP67, approved in 1987, which is the Northborough Shopping Center, otherwise known as Brittany Center, located at the southeast corner of 21st & Woodlawn Parcel 2, states Shopping Center and/or offices, professional, personal services, comparison and convenience shopping, and parking. A racquetball club was located there for a number of years and currently there is a business that operates the laser tag. Those would fall typically under recreation entertainment uses. Again, with all the ones previous to it, there was never any administrative adjustments or amendments to allow those uses in those.

Given the historical nature of shopping centers not only locally, but nationally, and the types of uses, we believe Mr. Schroeder erred to that extent. Just as a confirmation for at least some of the theatres, I will hand out a page out of the yellow pages in the 1982 Southwestern Bell Telephone Book, which just shows that the theatres were in existence.

There has been some discussion about historical interpretation based on the history of community unit plans in this community. One thing that I would note that the way that we do community unit plans, or the way that they were done in 1977 and early 1980's, is different than how we do them today. When they were developed in the 1980's, typically uses were identified and they were fairly limiting. They might name only 8 or 9 uses out of the typical 80 permitted by the commercial designation. Today's commercial community unit plans usually say all "LC" uses except for, and we generally exclude out those items that are typically viewed as undesirable. So, I would submit to you that in the last five years there have been 15 commercial community unit plans that have been approved by the Planning Commission, and also by the City of Wichita and the Sedgwick County, and every one of those commercial C.U.P.'s would allow a theatre in there, or Recreation and Entertainment, Indoor, in there by right. I think that is a statement that

says basically that the types of uses with Recreation and Entertainment, Indoor are acceptable for these types of commercial developments. Many of those C.U.P.'s, which our firm has worked on a number of them, are surrounded by residential property, and we believe this to be consistent with the findings of the Planning Commission and the Zoning Code.

Another area where we believe Mr. Schroeder erred, we believe Recreation and Entertainment, Indoor to be less intensive than the allowed uses. We base that upon a definition of intensity, which is on page 19, of the Zoning Code. If you had a chance to read Mrs. Dickgrafe's memo it talks about references to less intensive or more intensive uses refer to the zoning districts in which such are first permitted. Use "X" is to be construed as more intensive than Use "Y" if Use "X" is first permitted by-right in a zoning district that is less restrictive than the district in which Use "Y" is first permitted by-right. The City's point, or Mr. Schroeder's point, is that definition is not applicable to properties that have a community unit plan on them. We disagree with that. What the definition says is that those community unit plans or other special purpose districts, are not included in the hierarchy, but the "LC" or the underlying zoning is in fact included in the hierarchy. The zoning can exist without the special purpose districts, but the special purpose districts cannot exist without the zoning, so we believe that to be consistent.

Furthermore, if you go to the portion of the Zoning Code where the Planning Director on Administrative Adjustment to the Zoning Code, under that section he is specifically referred to the definition of intensity in the Zoning Code. While Mr. Schroeder may not believe that the Zoning Administrator does not have to rely on the definition, certainly the Planning Director, which is another administrative process certainly has to rely on that definition. That definition is black and white. It is not subjected to opinion. It is very straight-forward, and we believe it to be correct. That administrative adjustment criteria can be found on page 199 of the Zoning Code. Also, one of the letters that was submitted to you, or was faxed up for you to take a look at ahead of time, was from David Yearout, who is an AICP planner and former employee of the Metropolitan Area Planning Department. He writes zoning regulations for various communities, and his letter was one of support of our request.

RUANE: Tim, you have less than one minute left.

AUSTIN: Thank you. His professional opinion was that we were correct in our interpretation. Again he is a former employee and handles this type of work professionally. The other thing that we think Mr. Schroeder erred on was not acknowledging the restrictive covenant. The community unit plan, as it currently exists, is one of the older ones. It has less restrictions. It could have a 90,000 square foot shopping center on it with none of the buffering that we have offered to do should you find our request to be acceptable. I could probably address some of those other issues on the rebuttal, but basically that is our case.

RUANE: Why don't you stay there. Are there any questions for Tim at this point? Tim, in the exhibit that you provided that inventories the community unit plans approved

involving shopping centers, and theaters are all of those theaters interior, inside the shopping center?

AUSTIN: I believe that is probably correct.

RUANE: You mentioned that there could be a 90,000 square foot shopping center built on this C.U.P.?

AUSTIN: That is correct.

RUANE: As things exist right now?

AUSTIN: As things exist today, yes.

PHILLIPS: Since you brought up the question about the type of theaters and whether they are inside or freestanding, how many of them exist today?

AUSTIN: At present, none of them exist today.

PHILLIPS: When they did exist, what size of facility are we talking about, number of screens versus square footage?

AUSTIN: I believe the largest one was at Pawnee Plaza, which was four screens. As far as square footage I am not aware of what those are.

PHILLIPS: We are talking about an 18-screen theatre here?

AUSTIN: A 12-screen theatre.

RUANE: In your opinion, is there a difference between an indoor theatre and a movie theatre complex?

AUSTIN: No. I think in answer to your question, and I thought about this a little bit, about a theatre being part of a shopping center, free standing, and is there a difference? Just as an analogy, one of the CUP's that I looked up previously was DP-63, which was at the northwest corner of 13th & Tyler. The uses on that CUP are similar to the rest of them, and it was approved in the late 80's, but it talks about shopping center, but as we know it is a free standing Dillons grocery store, so if there is going to be a distinction between free-standing or a theatre as a part of a shopping center then in my opinion there has already been a distinction made between a free standing grocery store and one that may be part of a shopping center. I don't think that there is a difference based on my research.

FOSTER: Mr. Austin, when this C.U.P. was approved, we are talking about what year?

AUSTIN: I believe it was approved in 1982 or 1983.

FOSTER: Have you done any research to see what the "LC" district looked like at that time?

AUSTIN: I have not.

FOSTER: I will reserve that question to ask staff later on. Would you say that your main point is that your tie between the C.U.P. and the theatre is from the shopping center to the Recreation and Entertainment, Indoor definition within the present "LC", that that is the tie... the point that you are making?

AUSTIN: That would be one connection, certainly. That would be true because theatres are under "LC" in the current Zoning Code, and absent the C.U.P., if it was zoned "LC", the theatre could build there by-right. The second part of that connection, though, is that consisting interpretation of the Zoning Code on how it has been applied within the City, and that was the purpose of that handout when you look at Recreation and Entertainment, Indoor uses. Can you make that same connection, and certainly with the examples that I have given you, especially with respect to like Seneca Square where there is a Bingo Parlor, it would be consistent with what has transpired.

FOSTER: In your research and going through the different C.U.P.'s that you showed us, did you find that any of them had been decided by the Board of Zoning Appeals or by an adjustment or where they simply applied and got a permit to do it?

AUSTIN: On the ones I gave you, there was no indication of any administrative adjustments or BZA actions. As you know the City staff typically notes that on the face of the C.U.P. document, and there were no notations on any of those.

RUANE: No other questions at this time? Thank you Mr. Austin. Mr. Schroeder we would like to hear from you now please.

KURT SCHROEDER: I guess I will try to reply to some of those things that Tim talked about and maybe add a couple of other comments here. I think one of the key issues that he has talked about is this idea of intensity of uses within a community unit plan as opposed to simply within a zoning district classification. I think in your handout that you have from Sharon Dickgraft we have basically been reading this intensity of use definition where it says "Special purpose based districts and overlay districts are not included in the Zoning hierarchy" to mean something different than what Mr. Austin is talking about in his presentation to you.

We basically see all the special overlay districts, and you can see that as you read the purpose of the community unit plan is to more strictly control the development on the site and it always has been. Even though it may be zoned general commercial or limited commercial there would be more restrictions on the uses in that community unit plan. It kind of depends on what is around that community unit plan when it is developed, how it is developed, what are on the out parcels, what kind of buffers there might be. In fact, in

the purpose statement in the blue memo, it talks about the character of the development should be appropriate to the neighborhood and conditions and safeguards should be provided to ensure that the development will minimize any diminution, if any, to value of surrounding property. So right there it talks about the purpose of the C.U.P. and that you do have to take into account the surrounding neighborhoods more than you might with general or limited commercial zoning that it is not controlled by any protective overlay.

So that is a big difference, and I think that gets a lot to the argument about the Recreation and Entertainment, Indoor. The general definition that came into the Zoning Code when it was adopted in 1996, it gives a lot of samples. Well obviously in an Aladdin Palace is an example that might be inside of the Towne East Mall. It is a very small, 3,000 square foot facility you could classify that as Indoor Entertainment by the definition. However, is that the same intensity? Is it similar to a 12 screen or 14 screen or 18 screen theatre in terms of traffic generations, in terms of the comings and goings at night time and those types of things, and by our estimation it is not at all.

So when I looked at this, and my interpretation I had to look at the matter of degrees in those types of uses within Indoor Entertainment. So, that is kind of why I got and focused my interpretation on theatres per-se. In the development as we knew it, as proposed, and we have seen it with 12 screens. We seen it with 14 screens. In the paper recently, it talks about 18 screens. I don't know if that is what is intended here or not, ut 12 and 14 screens is what we have seen, with anywhere from 1,800 seats to 2,200 seats or so. That is quite a large use on that piece of ground there.

Historically, Mr. Austin, and his references, historically when C.U.P.'s have been developed and they have included theatre complexes or theatres, they have for the most part been specifically set out separate and apart from the other listed uses like shopping centers, like regional shopping centers, like Towne East mall, and Towne West mall. Like personal care services, taverns, drinking establishments, theatres have shown up separately in nearly all of the community unit plans that have been approved prior to 1996 when the Unified Zoning Code was adopted.

Part of what was in your packet was a number of the community unit plans. I copied like the front page to show you the area and then some of the writing out of that community unit plan. The ones before 1996, and you can see in there most of those are very similar in language to what is in this one, do expressly also say theatres as an allowed use separate from a shopping center or a services oriented shopping center, or car washes or whatever that might be. So that is how we have historically reviewed these. I did not review every one that he mentioned, but some of these very old community unit plans, like Pawnee & Seneca, I do believe that there is a little bit of difference, when again if we are talking about degrees, two theatres or four theatres inside of a shopping center that might only be 10,000 square feet as opposed to a large cinema is quite different in terms of a community unit plan.

So that is kind of how I looked at that, and that is why I looked at a lot of these older C.U.P's when I kind of did some evaluation of this and from meetings that I have had

with Mr. Austin back in June to discuss this matter. One the newer C.U.P.'s, again in your packet, you can see I went through a number of those. I think there are 17 or 18 there that I looked at over that last five years that have been approved, and while it is true that there are probably two or three that had been approved not excluding indoor entertainment, I think you have to look at the whole picture again that went through the public hearing process, and you have to look at the whole site plan to get a true picture of how that effects the surrounding neighborhood. Many of those are buffered by GO or some B Multi-family or some other kind of zoning to buffer between the out parcels where there might be indoor entertainment and an actual neighborhood. So you really have to look at that whole thing in context. Many of these have been developed with large reserve areas, lakes, K-96 highway cuts across them and serves as a major barrier so that is why I wanted you to see some of those notes, and I did look at those issues, and of course, those have been publicly disclosed and approved by the MAPC, and have gone through that hearing process, and those are the kind of issues that they look at in more detail, particularly since 1996.

On the administrative adjustment process, when you talk about the administrative adjustments, I think you talked about on page 199 in the Zoning Code. When it talks about adjustments to C.U.P.'s, which is usually the next step beyond an interpretation, or frequently is what needs to be done. An adjustment to the C.U.P. says the Planning Director with the concurrence of the Zoning Administrator may approve minor adjustments to approved C.U.P.'s unless finding that the proposed development would have one or more of the negative impacts stated in Section V-I.6, but in no event shall the Director approve an adjustment that allows any of the following, and in that list is a change in a use to any use that is more intensive. So he has kind of left out the part about in no event shall the Director approve an adjustment that allows any of the following, so you have to keep that in mind when he is talking about adjustments. It just says in no way can the Planning Director or the Zoning Administrator ever approve an adjustment that does that. It would have to go through an amendment process in that situation, so I think that is real critical for you to know.

It also refers to Section V-I.6 in that same statement there. In that Section it talks about Zoning adjustment criteria which kind of refers back to a lot of the things that I looked at in the interpretation. Things like would it adversely affect the safety and convenience of vehicular, pedestrian circulation, in the vicinity of a certain tract, including traffic reasonably expected to be generated by the proposed use. So that is one of the things you have got to look at even for an adjustment. It creates adverse impacts on existing uses in surrounding areas than that reasonably might result from development of the site with strict compliance with the adjusted standard. We looked at that particularly as related to traffic circulation and those things which are in your packet. The traffic engineer did look at some studies and will tell you in looking at that no matter what studies you look at in the evening hours for a theatre, cineplex with 12 or 14 screens you have a whole bunch more traffic than might be generated by even a fully built out site here that is allowed of 91,000 square feet in typical retail uses. So that was a tremendous factor in our reasoning. The area would be compatible with existing or permitted uses in abutting sites and in terms of the building height, setback, bulk and scale, things of that nature. Again,

with a theatre complex we are talking about a lot of nighttime use. I was taking into consideration in my interpretation letter, and I think set forth fairly clearly, that this site was very tight. It is surrounded by residential uses all on the west and on the north very close by. This will be very tightly packed in those uses, and if you looked at that particular item, the setbacks, the open space and the sheer bulk, and nighttime use here you could say that is just not appropriate if you were considering an administrative adjustment to this community unit plan. So he mentioned that. I kind of wanted to walk through that with you.

I also did want to talk a little bit about my letter and what I see as some of the key things that were highlighted. First of all, he had mentioned in his appeal that he filed that I didn't, and he mentioned here today, that maybe I did not really speak directly to the similarity of the intensity, and I think I did specifically talk to that in the second bullet and in the sixth bullet of my letter on page 2 and page 3 of my letter. Where it talks about allowance of theatres in older C.U.P.'s, theatres have been consistently identified and approved separately and distinctly from other proposed uses such as shopping centers, neighborhood shopping centers, personal improvement services, tire and battery stores, and convenience and service orientated retail. This would clearly indicate that theatres have previously been viewed to be a significantly intense use that is not necessarily similar to or equal intensity to these other proposed uses, and a theatre should be listed reviewed, and approved separately from other such uses. I think for the most part history from the City of Wichita will bear that out, and as I said, I probably missed two or three of those very old C.U.P.'s. I have only been here 11 ½ years. I didn't even remember a couple of those. There may have been theatres in place when those C.U.P.'s were developed actually, and now if you go back and look at those, they may have been existing already. I think most of them are 2 or 4 screens inside, so we could get more detail on that if you need that.

Also, in this particular C.U.P., if you are familiar with it, the uses out there have developed a very limited retail and office type scale. You have a bank, and maybe some of you have looked at this. There is a Tutor Time daycare, a small gymnastic academy out there. There is a little office, a clinic of some kind there on the north end that is developed. But basically this is a neighborhood type oriented community unit plan the way that this has been developed.

In our Sedgwick County Comprehensive Plan, this is bullet three in my letter, and you probably read this, it says very clearly, "Guide auto sales lots and other types of infrequent purchase or non-neighborhood serving commercial uses to areas (existing or planned) containing similar uses, and away from neighborhood commercial areas." The City would look at theater complex like this with 12 screens or 14 screens or whatever it is as a regional type of use not designed on a neighborhood scale, and if you drive this area, you can see that the character is very much neighborhood-oriented services out there in this area. So I think that is a very important point to be made.

Just to emphasize again, a community unit plan, I think the Code clearly tells us, that we look at that differently than the way that we would look at a typical zoning interpretation

where there is no overlay. That is a real key component to this interpretation today. It is a matter of degree, and even though theatre is an indoor use that is allowed in a limited commercial district, it doesn't mean that it is the same as an Aladin Palace inside of a shopping center or necessarily a bingo hall that might be inside of some shopping center, 3,000 square feet or something of that nature. We would have to look at these things and consider the degree and intensity and similarity of that use to these other kinds of uses.

I think that answered most of the items that he brought up. I would say that the handout that he gave out, we have had some shopping centers that have had theatres in them, but our Zoning Code is driven by local needs and development for our planning process, so I think that is something to note. That is probably a nice guideline as you are developing a Comprehensive Plan for some cities, but obviously every city develops these things different, and historically theatres have been looked at as a very intense use in this city.

RUANE: Thank you Kurt, and I am sure we are going to have some questions.

FOSTER: Mr. Schroeder, do the zoning regulations itself actually define a difference between the different indoor theatres in terms of 10, 12, 14, 16 individual movies?

SCHROEDER: No, it does not. It just lists them as a sample in today's Code of indoor, entertainment types of uses, and theatres could be one of those.

FOSTER: So there is nothing in there from the standpoint of the "LC" district where it would list recreation entertainment and so forth? Nothing defined in there that would limit the size of the theatre?

SCHROEDER: There is not in today's Code. Now I think someone provided that in the blue memo that definition for you, so it should be in front of you. You did ask a question about the past Zoning Codes. Theatres were always in "LC", and they were called theatres or places of public entertainment, separately from shopping centers and retail. All of these are in the same category, and they did not have a size classification necessarily either. C.U.P.'s always have been separate for the most part.

FOSTER: Let me make sure that I am understanding what you are telling me. In 1983, or 1982, when this C.U.P. was processed the "LC" district defined theatres as something separate? Did it not have a general category like the recreation entertainment thing?

SCHROEDER: It did. It had a couple of different items in it. I think I have that here somewhere, but it had a big list of things that are in "LC". Shopping center, personal care services, it had something called indoor, recreation, I believe, which was like bingo parlors, gymnastics, workout centers, and then it had theatres and public places or public entertainment was another one. What happened in 1996, those kind of all came together in one definition.

FOSTER: Does it stretch your memory to go back to 1983? Was there a definition to any of these that you are talking about the theatre or the recreation part?

SCHROEDER: Just what I just mentioned. I believe that it probably was in the 1983 addition of the Code in the "LC" district listed about 20-25 items. Shopping centers, retail, etc., theatres and places of public entertainment and separately things like indoor recreation, bingo parlors, and a number of uses. So that has been in the Code that way for a long time prior to 1996.

FOSTER: Is it fair to ask you, in 1983, when you weren't there, would the actual presentation at that time include a theatre due to the fact that it mentioned a shopping center in your opinion?

SCHROEDER: You mean for this particular C.U.P.?

FOSTER: Yes, in 1983, when this was processed, could one have foreseen when they had the zoning case that a theatre might have been included as one of these uses?

SCHROEDER: I don't know. I would have to look at minutes and things of that nature, but as I said most of these older C.U.P.'s when there were theatres anticipated they were listed separately along with shopping centers, neighborhood shopping centers, and all the other things that are in this C.U.P.

FOSTER: You agree when you were talking about an adjustment and so forth, this is not an adjustment, right?

SCHROEDER: This is not an adjustment.

FOSTER: You are just using that as an example?

SCHROEDER: He brought it up, and he mentioned it in his letter to you about administrative adjustment criteria, so I just wanted to clarify that he left out some of the wording.

FOSTER: We should probably ignore that as not being relevant to the situation here, in your opinion?

SCHROEDER: I think you need to focus on the interpretation more than the adjustment process.

FOSTER: You broke down, as well as Mr. Austin, the different factors as if this was a zoning case like MAPC was hearing it and so forth, were you responding just because he did that, or did you feel that was part of this kind of decision?

SCHROEDER: I was really trying to respond and clarify some of what he said, because he was trying to focus on indoor entertainment only, and I am trying to make a case that in a community unit plan there is a matter of intensity, similarity in degree of the

development that you really have to look at and consider. So C.U.P.'s are a whole different animal than a typical "LC" zoning lot.

FOSTER: Would you say that this is an issue that is purely based on an interpretation of how the regulations are written, and the C.U.P. is written, and not an issue of whether a theatre is desirable or not desirable at this location?

SCHROEDER: I am trying to base my interpretation on our history with what I think this City has seen in C.U.P.'s, and how they have tried to control C.U.P.'s, and how they viewed a theatre complex in terms of its intensity and affect on surrounding neighborhoods. That is how I have tried to look at this, from an historical perspective, and its affect on the way this corner has developed to date as it relates to our Comprehensive Plan, as the interpretation guidelines say that I need to do.

FOSTER: Have you had a chance to look at the list that Mr. Austin provided of the shopping centers that have gone in under community unit plans that have put in theatres or related uses?

SCHROEDER: That is not all of them by any means.

FOSTER: Right, because these were a sample of them I presume. Do you recall or can you tell us whether any of those have gone in because of administrative adjustments or interpretations, or were they simply allowed by right?

SCHROEDER: I probably couldn't without looking at a little more detail at those records. I know that for example he indicated the Towne East Mall, he talked about the Discovery Zone going in there. I believe that was an administrative adjustment, as I recall. I think I remember doing that.

FOSTER: In order to allow a theatre?

SCHROEDER: No, to allow an indoor Discovery Zone. That little smaller type of facility. That is indoor gymnastics for smaller children.

FOSTER: Which is now gone.

SCHROEDER: Which is now gone.

RUANE: Kurt, my question is, in the original C.U.P., can you show me what if any residential property was included within that?

SCHROEDER: There wasn't any in the original C.U.P.?

RUANE: Am I reading it correctly that it goes north to Douglas and includes Texas Street?

SCHROEDER: Okay, yes, two family dwellings, three or four families on Parcel 4. Then, two family dwellings in Parcel 5.

RUANE: What relevance does that have?

SCHROEDER: Well again, I think to me, it doesn't have a lot because of the way that thing has developed in looking at this in light of the Comprehensive Plan as I am suppose to. The neighborhood nature of that particular community unit plan as it is developed and then the overall affect of intensity on that overall area not just on a few houses there.

RUANE: Do you agree that a C.U.P. is like overlay zoning that a tract under common ownership agrees to?

SCHROEDER: Yes, it is overlay zoning.

RUANE: Once those parcels are divided out and split as these have, do those tracts within the C.U.P. have greater right than the general public to assert protection of the C.U.P.?

SCHROEDER: I don't necessarily think so. I think the reason we have a lot of these community unit plans and protective overlays is to protect the surrounding and adjoining neighborhood. While you are trying to control development within that C.U.P., you are also approving it up front with a lot of controls to protect the adjoining neighborhood.

FOSTER: Mr. Schroeder, do you feel that there are passages in the present zoning regulations that provide an opportunity that instead of looking at the "LC" in 1983, that it keeps moving all the time and it changes whenever the "LC" changes? In other words, when this was done in 1983 and adopted, the light commercial zone at that time, and is there something in the zoning regulation that allows that to be continually updated, so to speak, so that we are now looking at it in this year a whole different list or something? In other words, we are going to have a lot of these cases aren't we if this keeps up, in other words, 20 years from now "LC" is going to be different than it is now but the C.U.P. is going to be the same? But you are using the current "LC" to judge this, so to speak.

SCHROEDER: No, I am using both historic perspective of what the Zoning Code talked about and allowed back when this was developed in addition to what has happened since 1996 in terms of the Unified Zoning Code. I looked at both of those.

FOSTER: Do you feel the Code has provisions in the present Code to view it as a new use as terms of the present "LC"? Does that run with it, so to speak, no matter what if the "LC" was totally dropped in some future zoning regulation? Does that mean what happens to these underlying zones for the C.U.P.'s?

SCHROEDER: We would probably have to go back and look at what was in place when the C.U.P. was adopted.

FOSTER: I agree with you.

SCHROEDER: There is also an administrative adjustment process you mentioned. The Discovery Zone, when that first started coming about that was 8 to 10 years ago, that was kind of a new concept. There really wasn't anything for that in the Zoning Code, so we looked at that use and the intensity, and I believe that we did an adjustment for the one that was mentioned here in the Village Fashion Center, and probably a couple of others around town. It is kind of a new use. It hadn't really been thought of much.

MARKHAM: Do you have an amendment processes or some kind of an addendum that would allow the C.U.P. to be in line with things that are changing for like future use? Is there a process of updating?

SCHROEDER: There are several processes. Number one is the interpretation process. Sometimes things come about that are not quite written into the C.U.P. exactly. Is it or is it not the same as or less intense or whatever? The second is the administrative adjustment process, which we mentioned here today. It is a little bit simpler process; although, it is somewhat public. It is administrative, for the Zoning Administrator and the Planning Director have to concur on an adjustment to the C.U.P. It is done in writing. A letter goes out. Public is given a couple of weeks to comment with the sign out on the site. Then something can be adjusted or updated or added into that community unit plan to clarify something. Then, finally, if it is beyond all that, maybe it is a use that was never anticipated in the C.U.P. at all or it is an use that is extremely intense or much more intense than anything that was listed, there would be the amendment process. That would come to the Planning Commission through public hearing and then go onto the Council or Governing Body for final approval. In fact my letter talked about that in the final paragraph. You can appeal this or you can also request adjustment to the C.U.P. to clarify, or go through the amendment processes if necessary.

FERRIS CONSULTING, %Greg Ferris, P. O. Box 573, Wichita, KS 67201: I reside not to far from this area. Contrary to what you may have heard or read, I do not represent that neighborhood in this situation. I represent myself, and a few individuals who have asked me to represent them. One is an elderly gentleman that is a family friend that lives directly behind the property there. I will not be speaking for the entire neighborhood; although, I did submit today 430 signatures of resident that we gathered within the last four days of folks in this area that are very concerned.

However, that issue is not an issue that you need to address today. It is, however, an issue that probably should be recalled and remembered because the applicant has recourse to file for an amendment to the community unit plan. The community unit plan is not one that is vague. It is very clear that it does not allow theatres. It does not say that it does in the community unit plan, and the entire purpose of a community unit plan is to tell you what is allowed there, otherwise, we would just zone the whole property, and that would be the end of it.

I would agree with virtually everything Mr. Schroeder said with one exception. I do believe that the people who live on Texas Street who bought their homes and most of those homes, about 80% of them are owner occupied, that are a part of this community unit plan. They are part of the community unit plan and do have some right to rely on what the community unit plan says. They have that right to rely on that.

The community unit plan does not say that intensive uses such as bowling allies, theatres, and bingo parlors, and I am not just talking about theatres here, even though Mr. Austin can come up and say that we are really not talking about theatres here, we wouldn't want a large bowling alley on that property. We wouldn't want a large bingo parlor, and the reason is it is clearly a more intense use than is allowed. Why is it more intense? It is more intense because of the traffic patterns are far different than a normal retail establishment. It is more intense because the time of day that traffic is attracted to theatres and to bowling allies and to bingo parlors is significantly different than would be attracted to a shopping center or a battery and tire store. As you go through the list and look at what is allowed, it is significantly different, so when we are talking about our opposition our opposition, is because this clearly could not be in anyway mistaken that the use that they are requesting is more intense than what is allowed in the community unit plan.

I agree with Mr. Schroeder. It does not matter what the Zoning Code says as far as what is allowed in light commercial because the community unit plan tells you what is allowed. That is the whole purpose for them. The purpose for those in those days when we did the commercial and residential community unit plans was so that the people who developed the residential and bought those lots had a reliance on what was going to be next to them.

One of the other elements that Mr. Austin mentioned in his appeal was that staff failed to take into consideration the landscape buffering, the restrictive covenants if you will, and I have looked through those restrictive covenants they are not really very restrictive at all. A 20 foot landscape buffering might go and wouldn't reach the end of this table from the wall, and that is not what is normally seen in community unit plan when you are talking about intense uses. The reason this community unit plan doesn't require it is because it anticipated in its dialogue, in its approval, it anticipated neighborhood oriented uses not regional oriented uses. Regional oriented uses are more intense uses. You do not survive in a bowling alley from just attracting from the nearby neighborhood. You do not survive in a theatre from what is attracted in a nearby neighborhood, but if you look at a battery and tire store, but if you look at the neighborhood type of uses that are allowed, convenience stores, they do rely.

Finally, the last point that I would like to make is that Maple Street has developed as a residential corridor. It is not a heavily traveled commercial corridor. This would change that dramatically. The intensity here would change that dramatically, and we in no way are willing to believe that a theatre, bowling alley, bingo parlor, major complex of that type would not destroy the integrity of what this community unit plan says. The interpretation that has been rendered by staff should be upheld today. Let's put this to

rest. Give the applicant a chance, if they would like, to go through the process that is laid out clearly in the Zoning Code for changing the intensity in use. They can file that case and do that in public and not in a way that they have done that. I will be glad to answer any questions.

RUANE: Any questions for Mr. Ferris? Let's take a five-minute break. We assure you that we will not discuss anything material to this matter amongst ourselves, and none of you will discuss with us as well.

Okay, we are back on the record continuing with Item 2 on our Agenda. This portion is where individuals who have signed up on the sign-up sheet are each allowed as much as 5 minutes to address us with their thoughts, opinions, or concerns with regard to this item. I ask that you come to the podium, give us your name and address and make it clear which side of this issue you are on and then make your remarks, and if your points have already been made by someone earlier, you need not repeat them for us but merely state that you echo them rather than run through them. To get this process started I am going to pick on Mr. Hall, since he is so familiar with microphones and public speaking.

DON HALL, 120 S. MAIZE ROAD, TOWNHOUSE #9, Wichita, KS: I am representing the folks at the Rolling Hills Country Clubs Estates. We are for not having a movie complex being built there. We did not sign a petition, but in a unanimous vote, I am representing 61 people in the 36 townhouses. We comprise the east side of the street on Maize Road. We are built just north of Viewgate Enterprises, and we comprise 156 South Maize all the way up to 166 North Maize Road.

As mentioned, the buildings that you see in that area do comprise dentists, florists, gas stations, banks, dry cleaners, and there is no high traffic entertainment in that area. We have noticed just over the last several months, and years, the traffic flow on Maize Road due to the building of the complex on 21st and Maize. If you have ever been at a given time either on Texas or Douglas trying to turn north or being in our complex trying to turn south or north, there has been a tremendous increase traffic flow because of people living south of Kellogg or using Maize Road to go to the complex at 21st and Maize. So we do see a lot of the traffic that goes there, and we feel that a movie theatre that would have 12 or 14 screens would just intensify the traffic that is on Maize Road. That is our concern. I am representing the 61 people. I don't know if the decision today was a shopping center that I would be here. People would probably agree to a shopping center, those 61 people. Maybe even a bingo parlor, they would agree to, but when you are looking at a movie theatre that has movies starting at 1:00 in the afternoon and that special mid-night showing on the weekends, again that is just going to intensify the amount of traffic that we will see on Maize Road at that time.

Also a concern of ours is the age of the people that live in that area with Maple Gardens as a retirement home. We have quite a few people that are senior citizens that live in our development that average age between 64 and 66. It does make a burden to get out of our complex and go to the south, and many times to go to the north, and do some shopping with the amount of traffic that we currently have. We would like to see the people

develop that property. We would like to see the owners sell it. We would like to see something go on there. We like to see the weeds and grass cut down and have something nice there, so we are interested in something that would go in on that location we simply don't want to see a movie theatre that would have that much traffic, and again, it would only compound the problems that we have currently on Maize Road at that time.

VERN LAMBERTZ, 812 N. WACO AVE, Wichita, KS: I have been in the real estate business since 1952. We have developed many of the shopping centers, office buildings, etc., including some that have been named today. I have never experienced a problem of putting a theatre in a shopping center. It is generally taken as a given. It is normal. Not all centers have movie theatres, but some do. My development work has been done in other towns in the state of Kansas, as well as Wichita.

VERN IMES, 6654 N. Hillside, Wichita, KS: I am against the proposed intensive usage of that area. I own the property here (pointing). Those are nice twin-homes. They are brick, with shake roofs, double car garages, and so before you would allow any use like that, I would ask you to go out and stand anywhere along those areas and imagine what kind of light pollution would come from high light standards in such usage. The kind of noise pollution from the automobiles coming and going. The trash pollution just caused by people, and the omissions from all of those automobiles what that would smell like versus what it smells like right now. I guess I have some questions of you. If it is permitted to be used as they propose, what kind of proposal have they made on the buffer zone? How high would the wall be, trees planted, grass and that kind of thing? Do you know that today?

RUANE: Have you seen the restrictive covenant that was proposed?

IMES: No, I haven't. Could I get a copy of that?

RUANE: I am certain that you can. Tim do you have an extra copy of that?

IMES: Who would enforce their offer to put in that kind of a buffer zone? Who would enforce the maintenance of it and so forth?

RUANE: I am going to allow Mr. Austin to respond to that in his rebuttal.

IMES: That is all I have to say. Look at the environmental situation out there and how it will affect the people who live out there.

BILL DEMOSS, 10507 W. Texas, WICHITA, KS: I don't know how to work the slides, but could I get the slide that shows the houses around the proposed site? I live right next to the property. My house is right here (pointing), and as you can see there is an extension there and my fence is right on the property line within 10-15 feet. I wasn't there in 1983. I bought the property about 5-6 years ago, and the last two years I have spent approximately \$50,000 adding a sunroom full of glass looking over the back and

about \$20,000 worth of landscaping on the back to enjoy the peace and quite of the neighborhood, knowing that it had a chance of having some commercial development. I thought similar to what is currently there. The plan that is proposed is the most hideous thing that I could imagine going into that area. I think that it would greatly diminish my property values, but more importantly I would fear more for both our way of life as well as our safety. I understand there would be people there at night on Saturday's and Sunday's. There is going to be unlimited traffic that is all going to be within 40 feet of my bedroom, and it is all just unimaginable.

RUANE: That completes our list of who has signed-up. Is there anyone else that has changed their mind that would very much like to be heard today on this issue?

KELLY HOPKINS, 10505 W. TEXAS, WICHITA KS: I live near Mr. DeMoss. Again, my property backs up to this property, and we are against this proposal, and we support the staff's recognizing of the more intensive use and would like you to know that I am here to support the staff's point of view.

RUANE: Sticking with the outline that we had proposed, Kurt Schroeder for 5 minutes followed by Tim Austin for 5 minutes or less.

SCHROEDER: There are just a couple more things I would like to reflect on. Tim did talk about the restrictive covenants in his application to you and I think that is important to note it does talk about in the Zoning Code looking at other documents that maybe deemed relevant. Typically that would be the Comprehensive Plan, Zoning Code those kind of big policies and types of documents. I try to focus on the interpretation and what it was about in the C.U.P. I didn't look at that extremely closely in my interpretation; however, I think there are things looking at that to me don't protect that neighborhood very well in terms of the setbacks, the buffering and those kinds of things. I did want to mention that again because of the neighborhood scale of this development in this C.U.P. I think that comes into play.

Also, just historically, let's talk about this C.U.P. There have been three adjustments made to this C.U.P., and just to refresh your memory, in 1988 that was for a single-bay car wash, what is now a Amoco, well away from any of the residential. An adjustment was done to allow that single-bay attachment to the allowed service station. That is how, historically, that has been viewed. The daycare center, I think that it has 180 students maximum, an administrative adjustment was done to allow that use, which I think most anybody in this room would agree is much less intense then the proposed theatre complex. Also, an administrative adjustment was done in 2002, as recent as February this year, to allow a car wash on a Parcel on this C.U.P. that was at least 350 feet away from the closest residential, and they went through an administrative adjustment process, and it was not interpreted that that was allowed by right. So that gives you some kind of a feel for the neighborhood scale of this community unit plan.

I just want to emphasize again, and Mr. Ferris brought it up, and I want to re-iterate again looking at the Comprehensive Plan, it does say focus on areas that have developed as

neighborhood type serving commercial corners should be kept that way and try to keep away the regional type developments as they are much more intense and have much more affect on the neighborhood. I think that is a real important factor in this particular interpretation.

RUANE: Any questions for Kurt?

TIM AUSTIN: I want to take this opportunity to discuss a little bit on the intensity. It is very convenient for the City to talk about intensity in a very subjective opinion. When Mr. Ferris stood up here, he talked about some things, but quite frankly there is no facts in terms of the intensity. The traffic counts that they were talking about, the Traffic Engineer, I met with him, and basically, he said the traffic generation is the same for the shopping center that could be built there and for the theatre complex. While it is true that the peak times for theatres might occur later in the evening, the reality is that a shopping center would create a greater impact on the facility in terms of the arterials on Maple and Maize than a theatre would, and that is because the peak times for a shopping centers occur when it is the commuting time. So from an intensity standpoint how do you judge it? It is very subjective. I would like to re-emphasis again that the Zoning Code is very plain about the definition of intensity. I don't want to get sidetracked about the administrative adjustment process. When I brought that up, and Kurt clarified that really, the only reason why I brought that up is because in that administrative adjustment process it talks very specifically that the Planning Director has to consider intensity in that administrative adjustment process, and that is one of many things. But the point is that he has referred to the definition of intensity. Mr. Schroeder doesn't want to abide by the definition of intensity. He wants to cloud the issue. He wants to talk to about impacts, perceived impacts on his part, perceived impacts that quite frankly we don't agree with. Intensity is black and white. It is in the Zoning Code, and quite frankly if you look under the uses under the Zoning Code page 123, most of you are probably fairly familiar with the matrix on commercial uses or residential uses. It has across the top the various zoning districts and it lists on the left hand side the various commercial uses. If you will follow with me recreation and entertainment indoor in some way can be construed to be less intense than a shopping center because recreation and entertainment indoor is a Conditional Use in Rural Residential. Again, maybe it is with respect to other types of recreation entertainment indoor uses, but quite frankly, there is a whole host of issues there, and the fact of the matter is if we were going in rural residential while it would be subject to a Conditional Use, we would have the right to apply for that use. A shopping center couldn't go into Rural Residential. They would have to do a zone change first, so it just depends on which agenda you have as to which definition of intensity is applicable. The historical perspective is interesting, and I am glad Mr. Schroeder clarified that theatres were allowed in "LC" uses in the early 80's. It seems to be again that if it was separately defined, whether it was or wasn't and then it was lumped in with the recreation, entertainment indoor in 1996, and if it was to be so much more intense than those other uses such as a bowling alley or bingo parlor or if they felt that two screens was okay maybe four screens but 12 or 14 screens weren't appropriate, there was certainly an opportunity to address that issue at that time in 1996. So what you have is the City staff attempting to re-write the zoning regulation. That is what it is all about.

We are talking about use, and it doesn't matter how many screens there are. It is simply whether it is a recreation entertainment, indoor use, and given the information that we have provided you, we think that we are correct in our interpretation of the Zoning Code. Just because we have done administrative adjustments in the past doesn't necessarily mean that it is right, and it doesn't mean that it is legally correct. For those of you that are involved in the process, when it comes to development time is money. Certainly if we felt that an administrative adjustment would have been successful to go that route, and it would have resulted in a more timely decision, a less expensive decision, maybe we could have went that route, and sometimes those are just business decisions. It doesn't mean that they are a policy. It doesn't mean that they are right or wrong. It is just a business decision.

The last thing I would say that if you tend to agree with Mr. Schroeder's argument, again the traffic is no more. It will occur at a later time when it has less impact on public facilities. The bulk of the requirements are actually going down. The restrictive covenant limits the building size to 40,000 square feet as opposed to 91,000 square feet, and I don't know, Mr. Ferris talks about the buffers being inadequate, I did a zone change amendment to a C.U.P. for the Home Depot out west. It has less buffering than what we had in this case, or are proposing, and Mr. Ferris was on the Council at that time and approved it. Those buffers are there and they are more intensive than many of the buffers that you find in C.U.P.'s. If you go to the Sterling Farms C.U.P., it has less buffers than this one. I will be happy to answer any questions.

RUANE: One short question.

FROM THE AUDIENCE: On intensity, you had a 4:30 show letting out say around 6:30 and a show starting at 7:00 on 12 screens. How many cars would be coming in, and how many cars would be coming out of that complex?

SIMMERING: For the record your name, sir.

DON HALL, 120 S MAIZE ROAD TOWNHOUSE #9 from audience: The question again. If a 4:30 p.m. show lets out around 6:00 and another show is going to start at 7:00 p.m. How many cars would be leaving the complex, and how many would be coming in if 12 screens were operating?

TIM AUSTIN: I think that information has been provided to the Board of Zoning Appeals, and let me see if I can figure that out for you Mr. Hall. In the 4:00-6:00 p.m. time frame?

DON HALL: No, I am saying between 6:00 p.m. and 7:00 p.m. If a 4:30 show let's out and people are leaving between 6-7:00 and you have more people coming into your complex for the 7:30 show, within one hour how many cars are leaving, and how many cars are coming in? What is the intensity?

TIM AUSTIN: I don't have that information, I am looking at what the traffic engineer generated, and I had met with him, but I can tell you overall traffic counts for the two are very comparable. Again it is just a matter of when that peak occurs. Ultimately at the end of the day...

RUANE: Let me try to wrap this up, and I would encourage either Kurt or Tim to let me know if I mistake this. According to the materials submitted, the traffic counts indicate that with 12 screens, the average vehicle trip ends in the 4-6 period would be 534.

AUSTIN: That is an amount of total vehicles generated that includes trips in and trips out. There is not a break out between in or out.

RUANE: In the 7:00 to 8:00 period, that is separated, and the information is bracketed separately and that's 1,073 weekday and 1,077 Saturdays, and that is also again computed on total trips in and out from the information submitted. Is that correct?

SCHROEDER (away from podium): And a shopping center from 7:00 p.m. to 8:00 p.m. was 320 weekday, and 456 Saturdays for that same time period. So there are different studies depending one-half to 3 or 4 times traffic generated.

RUANE: I think that concludes the presentations today. We will bring it up to the Board for our discussion. I appreciate your patience and going through this in a way that is slow but also ensures fairness. As I begin our discussion, I need to remind us, and everybody, that it really is not our choice here today as to whether or not we would like the theatre complex to be there or not, whether for it or against it. It is a much more specific question than that, and it really has to do with whether or not we think Kurt Schroeder was right or wrong in the interpretation that is written up. That is really the subject, and the basis for all of this. His opinion was that the proposed theatre complex did not fall within the proposed uses allowed in the community unit plan that we have been talking about. This body has three options. We can come to the conclusion that we don't have enough information from which to make a decision and send it back for further study and additional and more sessions like this, or we can determine that we agree with Kurt's decision, or that we do not agree with Kurt's decision. We are a quasi-judicial body, and there are appeals, perhaps, that may be taken from our decision but it is important that we make a decision on the right issue. Sharon have I correctly stated the scope of reasoning?

DICKGRAFE: Yes, generally you can affirm, you can reverse, you can modify his interpretation. Given that criteria, I think that it is important that the Board focus on the limited issue, which is his interpretation of the C.U.P. language as well as his responsibilities under Article V-E.15 in interpreting C.U.P.'s as far as what is permitted in that the uses are similar to and no more intensive than the uses listed in the C.U.P., and there have been some discussions by both applicant and Mr. Schroeder regarding that provision.

FOSTER: I would like to see one other item discussed, and maybe added to your point, and that, this case is not a side of the neighborhoods. I am sure that nobody wants to hear that but it is not a vote of the neighbors. Mr. Ferris has presented a list, not to us but I guess to the staff, of 400 names, and Mr. Hall mentioned 61 people. There are a lot of people here today, but zoning, as I understand it, is not a vote of the number of people that are concerned about it. It is a factual question of interpretation. Am I right on that Sharon?

DICKGRAFE: Yes, this is unlike a variance case where emphasis on the neighborhood is a factor. This Board's goal, or purpose, is to look at Kurt's interpretation and determine whether or not it is consistent with the language of the C.U.P. as well as the purposes of the C.U.P., which have been outlined in my memo to you, and determining whether or not that interpretation is reasonable. But Bickley is correct that neighborhood opposition, certainly they have the right to be present, they have the right to appeal any decision as an interested party; however, that is really not a factor that this Board needs to determine in looking at whether or not this interpretation was reasonable.

RUANE: Point well taken. Let me throw this out as a tool to begin the discussion. Is our decision as simple as whether Kurt's conclusion was reasonable that an indoor theatre or theatre is a less intensive use than a proposed theatre complex. Is it that simple?

FOSTER: Would you repeat that again?

RUANE: Well, could it be as simple as the question is, "Was Kurt Schroeder reasonable in his interpretation of the C.U.P. to conclude that an indoor theatre would be a less intensive use than a proposed multi-screen theatre complex?"

FOSTER: It seems to me that might be the ultimate questions, but I suppose there are others that proceed that don't you agree? I think it is an interesting thought to think about that the people make C.U.P. in 1983, and if the applicant had appeared and said by the way I want to put a theatre in the shopping center, I doubt if there would be single person here that was here today that would have shown up. We are talking maybe one or two screens, and people would really be asking when does it open. What the real issue is that conditions have changed, and we are now in 2002, and we have mega screens and 16 of them and traffic that is talked about, and yet the zoning has probably not kept up with that. So, I enlarge upon your issue Mr. Chairman, that the question is do we look at this back when the applicant filed the C.U.P. in 1983 what the intent was, and I think history is a part of all this, or do we look at it as today? I think that is what makes this a very interesting and difficult question. I do have two or three questions that I would still like to ask the staff, Mr. Chairman, that are purely factual questions to determine something in the zoning regulations. Would that be appropriate. Mr. Knebel could you join us at the podium and bring your book with you?

May I assume that we both agree that the C.U.P. provides for an overlay on the "LC" district? That there is wording to that affect in the zoning regulations?

KNEBEL: Correct, the C.U.P. is an overlay district. That is correct.

FOSTER: Where do we find, and is it in the zoning regulations, that the "LC" that was laid out in 1983, and where does it tell us that we can use the "LC" of 2002?

KNEBEL: The property is zoned limited commercial and the Code, if you look at the second page of the Zoning Code, the Zoning Code is applicable to all properties within the zoning jurisdictions of the City of Wichita.

FOSTER: Well, isn't this a little vague as to whether the "LC" travels with it for 27 years or something like that?

KNEBEL: No, I don't believe so. I believe that when the Zoning Code is amended, it then is applicable to the properties that the book says that it is applicable to, and in this case, it says that it is applicable to all properties within the zoning jurisdiction of the City of Wichita, which this property is.

FOSTER: I assume Scott, that we have to be careful that we are not talking about something as vague. Is it something, do you have any wording in there that tells us that or is that something, that has always been assumed and something that has been used in C.U.P. for years?

KNEBEL: You are confusing me. Before you were talking about the applicability of the "LC" Limited Commercial zoning district. Now you are asking a question about the community unit plan.

FOSTER: I didn't hear you.

KNEBEL: Before you were asking a question about the applicability of the Limited Commercial zoning. Now you are asking me if there is something in the Zoning Code about the community unit plan wording?

FOSTER: That it travels, in other words, where does it say that we are not using the 1983 "LC"? What tells us that we are using the 2002 "LC"?

KNEBEL: That is the same question that you asked previously. The Zoning Code, when it is amended, is listed in the Zoning book on page 2. There is a list that says what the Zoning Code is applicable to and it says that this Code shall apply within the zoning jurisdictions of the City of Wichita and if this Code is amended, in other words the "LC" zoning district is amended, then it applies within the Zoning jurisdiction within the City of Wichita.

DICKGRAFE: Bickley, if I am understanding your question, it is not going to make any difference in this particular case. I mean "LC", this property has been "LC" since the C.U.P. was developed in 1982, and in 1982 theatres were allowed in "LC"; although, there was not a definition of theatres in the Code in 1982, so even if you utilize the Code

in 1982 it is not going to provide you any assistance or change the analogies as to whether or not the theatre was a permitted use. It would have been permitted in "LC", but for the C.U.P. overlay, which is what the Board needs to interpret is the language in the C.U.P., if that clarifies your question or what I think your question is.

RUANE: Because the C.U.P. is overlay zoning which replaces the Zoning Code and its typical applicability while it may chose to use terms familiar or pulled from the Zoning Code, it is placed on the land as is, and amendments to the Zoning Code do not amend the C.U.P.

FOSTER: That is what Scott is saying. He is saying that we use the 2002 version rather than the prior version.

KNEBEL: You are confusing the two issues, I believe, Mr. Foster. The two issues are the property is zoned "LC" Limited Commercial. That "LC" Limited Commercial zoning district, and the zoning district standards as those zoning district standards are amended; they do apply to this particular property. Now there may be uses that are established on that property, but then are non-conforming with this zoning district. There is a whole separate section in the Zoning Code that addresses how those non-conforming or grand-fathered uses are addressed. However, the community unit plan, unless it is specifically amended by the Planning Commission or the governing body depending on the type of application that is made or by the staff through an adjustment, it remains in place and does not change even if the Zoning Code of the City of Wichita is changed.

RUANE: We are making a record here and it is important that things proceed in the right way. Is Scott's understanding correct that the overlay zoning does not supplant the Zoning Codes applicability?

DICKGRAFE: It is an overlay. I mean you are going to look at the language of the C.U.P. That should be consistent to the underlying zoning of the area to try to get your compatibility between the two.

RUANE: Thank you. That answers my questions.

FOSTER: Scott, how did we get to the idea of intensity and so forth? How can an analogy be brought in about the intensity of these uses? Where do we look in the Zoning book to figure that out so to speak? We are interpreting the Zoning book in terms of Mr. Schroeder's view of it.

KNEBEL: I think the appellant has correctly pointed out the location of the definition of intensity.

FOSTER: I see the definition of intensity, but how does it relate to a C.U.P. here?

DICKGRAFE: It comes into play in this case because under Article V, Section E-15, which is in my memo, Kurt has the authority to interpret the Code so long as those

permitted uses are similar to and no more intensive than the uses allowed by the C.U.P., which is where the whole intensity issue becomes an issue. Is Kurt's interpretation regarding whether or not this is, one, permitted by the language if it is not permitted, then two, whether or not this use is more intensive than those permitted, which is how the intensity issue arises in this particular interpretation.

RUANE: I would suggest that is the sequence that we should address these questions if we are going to get to a decision, any other questions of Scott?

FOSTER: Doesn't seem that if we wanted to do this in some orderly way, and by the way we can have a closed session to discuss this, but I don't see any need for it in this particular case. It seems to me that we first ought to discuss are we talking about the expectations of people that signed onto this back in 1983 and what they anticipated as what they would have if they bought into this area. Or are we talking about it changing over a period of time in terms of what the Zoning regulations provide for now? And then interpret that in terms of intensity? Are we going to, I think you can look at either way. You can look at in 1983 or look at now and in 1983. You wouldn't be talking about intensity.

RUANE: If answers to those rhetorical questions would lead to one result versus another result, and I would be happy and encouraged to wrestle those to the ground, but I am not convinced that they are entirely relevant for one. But, I leave it up to the Board.

PHILLIPS: My feeling is that we are not a regulatory Board. I think we have a fairly small duty to do today, and that is to basically either agree or disagree, and if somewhere in between that we feel like we need more information, which I think maybe all of this is about, if we need more information, we can take that option, and we can render a decision at some other point. But at some point we are going to have to vote, and for me having had some experience in these areas, because, as Mr. Austin pointed out, we have been involved in designing movies theatres for 20 years, and we have been involved with regional as well as neighborhood shopping centers, and we have also, in the process of doing that, have had to deal with staff and looked at the way that they have interpreted things, and I think the majority of this Board has been long enough, with Ms. Markham's exception, that if she has no other questions or needs anything clarified, I think at some point we need to basically do our duty, and that is confine the discussion to this Board, and at some point I think, expeditiously or judiciously, we make a decision.

I think that it is a complicated enough question at this point that I can see where some of the questions and concerns come from, and I think as it was pointed out very early that is a matter of affirming or reversing Mr. Schroeder's interpretation. Now if we are going to try and interpret his interpretation, I really think that we have taken it to far.

RUANE: In particular because the burden of persuasion is by City Code on the applicant to convince that Kurt's opinion was wrong.

PHILLIPS: I think that was the way that it was presented to us. I think that is the way that it is written, and I think if we perceive it any other way we are not doing what this Board is really convened to do. I think Mr. Foster has a great deal of understanding in Zoning, and some of the interpretation, so I think he probably has a little bit of an edge on us in that regard, and I appreciate his ability to try and clarify some of the issue, but I think I have to keep coming back to what the basic issue is. Do we agree or disagree with Mr. Schroeder's interpretation, and I think we have to make that decision based on the information presented by Mr. Austin because that is all we have to go on, and I speak not only as an architect with experience in these things, but I live within a 2 ½ mile radius of the property so I know the area very well, and I know a lot of the people in the audience. At some point, I think we have to sit down and do what we are suppose to do.

FOSTER: Could we get the sense of the Board? First of all Mr. Austin has raised the question of adding restrictive covenants, which would provide some buffer and landscaping and so forth. In my opinion that should not be added. I do not think that C.U.P. can be amended, so to speak, to add the amenities to it and so forth. I would like to get some idea of the Board's feelings whether that is an issue anymore. And then the second one Mr. Austin brought up, and used the different, and the audience may not know that the factors that Mr. Austin brought up and Mr. Kurt Schroeder responded to are the factors used by the Metropolitan Planning Commission when they consider a rezoning case or a C.U.P., case and I raise the question whether that is even an issue at all. I am saying they are not an issue. It is my thought that neither the restrictive covenants is not an issue to be considered nor is it a question of factors as whether this is good or bad for the area in effect and that kind of thing. I think those two thoughts should be eliminated.

SKELTON: I agree Mr. Chairman.

RUANE: If you want to make a motion we could take action on it.

FOSTER: I would move that the two factors, one the restrictive covenants proposal and the issue of whether the factors support or turn down the proposal, be removed from our consideration as not being part of our analysis.

RUANE: I request a friendly amendment that you split that into two motions and we vote on each separately.

FOSTER moves SKELTON seconds, that to aid in our discussion that we would eliminate the idea that it is possible to consider a restrictive covenant as being added to the C.U.P. of the 1983.

RUANE: There appears to be no discussion. Let's call the questions.

MOTION carries 5-1 (Ruane opposed).

FOSTER moves to determine that an analysis of factors made by both the applicant and Mr. Schroeder which are to determine whether zoning should be approved or not approved are not germane to the decision that we should make.

RUANE: Utilizing the typical factors that we use to approving a variance?

FOSTER: I am saying that the eight or nine factors that were used are part of the rezoning and C.U.P. material. They are not part of the Board of Zoning Appeals thinking. I think that we ought to eliminate so the audience knows that the issue of whether this is desirable or not desirable is not an issue for us in that sense.

DICKGRAFE: I am not sure that the Board needs to make a motion and vote on those issues. The Board needs to make its determination based on everything that has been contained in the record either by the applicant or Kurt. The weight to be given to those facts and the analysis of those facts really is up to each individual Board member and if we start cutting these things out of the record, we are not going to consider this or we are not going to consider, that it will make it very difficult for the applicant and or the City, should this be appealed later, to utilize all of the information that has been contained in the record. So I guess I would caution the Board if we are going to start picking apart the record, that may not be an appropriate function of this Board right now. I think you can discuss what is in the record, and I think that Bickley can make his arguments of what should or should not be considered. I will be happy to respond to any of those questions that would be asked, but if you start cutting out, we are not going to consider this, we are not going to consider that, it will make this record essentially worthless and very difficult for anyone to try to appeal, and for this Board, when we get to a motion stage, to set forth in that motion the facts that it did rely on in making this determination.

FOSTER: But, Sharon wouldn't you agree that there are actually three decisions that could be made, and the Chairman mentioned those, and one is to...

RUANE: Let's try not to backtrack.

FOSTER: One is to even modify, and that would be a possibility to.

DICKGRAFE: That is correct.

FOSTER: I leave my motion that we should not be considering the factors that decide whether a theatre is desirable or not desirable, so to speak, at that location. That is what both the applicant and Mr. Schroeder is speaking to.

RUANE: I understand your motion is there a second. With no second the motion dies for lack of a second. Any commentary or motion toward reaching the ultimate decision that is our task?

SKELTON: I think what I am going to do is to vote to affirm Mr. Schroeder's decision. His letter dated August 22, 2002 to Mr. Austin clearly spells it out to me, and placing emphasis on the first two paragraphs on the second page, and I do think his interpretation is reasonable.

RUANE: Thank you. Any other questions or comments? As we put together a motion be mindful of the facts that we must make specific findings of fact that would support our decision one way or the other, so as a motion comes forward be thinking of those, and perhaps we can work as a committee to come to a vote. Would there be a motion at this time?

PHILLIPS moves MARKHAM seconds, TO AFFIRM THE DECISION OF THE ZONING ADMINISTRATOR

HAVING CONSIDERED THE ENTIRE RECORD REGARDING THIS MATTER AND HAVING HEARD THE EVIDENCE AS PRESENTED TO THE BOARD HERE TODAY, I MOVE THAT THE BOARD MAKE THE FOLLOWING FINDINGS:

- 1. That the Board of Zoning Appeals has jurisdiction to hear this appeal, pursuant to K.S.A. 12-759(d) and Section 2.12.590 of the Code of the City of Wichita, Kansas;**
- 2. That the Board makes the following finds of fact:**
 - a) That the Zoning Administrator, pursuant to Article V, Sec. H (1) of the Wichita-Sedgwick County Zoning Code, had the authority to make the interpretation of the zoning code issued on August 22, 2002.**
 - b) That the language of the CUP (DP-104) limits the use of the parcel at issue to those proposed by the express language of the CUP.**
 - c) The interpretation made by Kurt Schroeder was supported by the language contained in Wichita-Sedgwick County Unified Zoning Code and the express language of the CUP defining the allowed uses.**
 - d) The proposed use of the parcels as an indoor theater is not a similar or less intensive use than those allowed by the express language of the CUP.**
 - e) The restrictive covenants for adjacent property do not provide sufficient mitigation for any adverse impacts caused by the proposed use of the property.**

3. The Board further finds that the interpretation of the Zoning Administrator as set forth in his letter of August 22, 2002, was reasonable and is supported by the evidence presented at this hearing.
4. The Board further finds that the appellant has not met his burden of proof to show that the interpretation was in error.

THEREFORE, BASED UPON THE FOREGOING, I MOVE THAT THE INTERPRETATION OF THE ZONING ADMINISTRATOR HEREIN BE AFFIRMED.

DICKGRAFE: I may make one point of order that the motion with the language regarding the restrictive covenants would seem to be inconsistent with the Board's prior ruling indicating the restrictive covenants was not going to be considered and just make that a point of order for the Boards determination as to how they wish to proceed.

RUANE: Any change to motion?

PHILLIPS: The only change would be to recognize that note.

FOSTER: What was his position or what are reading his position on the restrictive covenants? Is he including them in his analysis in your opinion?

PHILLIPS: I am moving to affirm that his interpretation was valid.

FOSTER: Are you saying that he took into account the restrictive covenants to make that determination? Do they immoderate the problems related to putting a theatre there or not?

RUANE: His says that the restrictive covenants do not provide sufficient mediation. So it is considered not to be sufficient. So I think that it can be read as internally consistent and hope anyone else looking at this issue sees it the same. We have a motion and second, further discussion?

FOSTER: As much as I would like to agree with Mr. Schroeder. The zoning regulations are not supposed to be vague, and I have not heard or not read, and I have read every word of this, that I do not find a clear understanding that the Zoning Administrator has the opportunity to at this time in history to review this any different than they would back in 1983 as to the intensity and so forth, and I see no connection to this question of intensity, and I so I also do not agree that the Zoning Administrator has an opportunity to consider the restrictive covenants which are offered. I don't think that you can come back at this late date and add restrictive covenants and have them even be considered. I don't think that his analysis using the analysis of MAPC like a rezoning case is germane to this. So I feel that it is rather an inconsistent statement as much as I

would like to agree with him, but I don't think that it is very clear that it is possible to take this and interpret that particular use today differently than it was in 1983, when it would have been allowed, so I will vote against the motion.

RUANE: I understand your comments, but things change. In 1982 no one ever even dreamed that there would be a 14 screen mega-plex movie theatre. I think the Crest theatre may have even been still open. That was kind of our idea what going to a movie was like.

FOSTER: I am saying that the zoning regulations have not kept up with it in terms of making this kind of determination. You heard Mr. Schroeder say that it does not define the differences between the different sizes of theatres. I am saying that we have a deficiency in the wording in the zoning regulations to clearly give us direction in this. I would like to see the decision made otherwise, but we ought to have it clearly in the zoning regulation. We have a whole list of shopping centers here that are allowed theatres, and we have heard nothing to the contrary that they were not allowed as part of shopping center.

MARKHAM: Mr. Foster, you are saying that in coming to this conclusion, I am trying to understand what you are saying, in reaching his conclusion then the administrator was correct but you are saying that he should not use restrictive covenants in intensity as supportive evidence in his decision. Is that what you are saying?

FOSTER: A little larger than that. One, I don't think that he should use restrictive covenants because I don't think they can be brought into it, and number two, I don't think that he can use the eight or nine factors as an analysis as to whether it is desirable or not desirable, and I don't make the connection between the analysis of intensity today versus what it might be in 1983. You heard Mr. Lambertz indicate he has probably developed more shopping centers then anybody in this room, and he includes a theatre in those shopping centers and that is what was done years ago. We wouldn't have even had a meeting today, and so I think that people ought to expect what they bought into. They bought into a C.U.P. that at the time that it said if we looked at it when people bought their land and so forth, it would have allowed a theatre at that time, and I am saying the zoning regulations did not keep up with that.

RUANE: I will argue back with you. If I bought one of those houses on Texas Street, which was within this C.U.P., and I got my title work as I was trying to go to closing. I would read that on these tracts of land there could not be anything other than an indoor recreation such as a theatre which would be indoors.

FOSTER: That is what this is. This is not a drive-in movie theatre.

RUANE: What other discussion do we have? Is there objection to calling the question? We have the motion and it is a motion to affirm the decision of the Zoning Administrator. We have a second. We have had a spirited discussion, and it appears that we are ready to cast our votes.

**MOTION TO AFFIRM ZONING ADMINISTRATORS DECISION vote 5-1
FOSTER OPPOSED.**

RUANE: So this means that the administrative interpretation by the City stands. Now you are free to leave and thank you for being so patient and kind. We still have other items to take care of, so if you will please leave quietly, we will keep cranking through. J.R. what is the report from Central Inspection with compliance with requirements of various cases.

COX: I will be more than happy to wait until the next meeting.

RUANE: I think that is a great idea.

SKELTON moves PHILLIPS seconds: To table J.R.'s report until the next meeting.

MOTION CARRIES 6-0

MEETING ADJOURNED 3:54 p.m.